UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

MEMC ELECTRIC MATERIALS, INC.

and **CASE 14-CA-27688**

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

Christal J. Key, ***Esq***.,
for the General Counsel.
Timothy J. Sarsfield, Esq., and
Stephen P. Smith, **Esq.**,
for the Respondent.
Mark W. Conner, Business Representative, for the
Charging Party.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me in St. Louis, Missouri, on August 23, 2004, pursuant to a complaint filed by the Regional Director of Region 14 of the National Labor Relations Board ("the Board") as amended on June 17, 2004, and as further amended at the hearing. The complaint is based on an amended charge filed by the International Association of Machinists & Aerospace Workers, AFL-CIO ("the Charging Party" or "the Union") on February 23, 2004. The complaint as amended, alleges that MEMC Electronic Materials, Inc. ("the Respondent" or "the Company") committed violations of Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act"). Respondent has by its answer as amended at the hearing denied the commission of any violations of the Act.

Upon the entire record in this proceeding, including my observation of the demeanor of the witnesses and after consideration of the trial brief filed by the General Counsel and the closing argument of the Respondent, I make the following:

Findings of Fact and Conclusions of Law

I. Jurisdiction

A. <u>The Business of the Respondent</u>

The complaint alleges, Respondent admits and I find that at all times material herein, Respondent has been a Delaware Corporation, with offices and a manufacturing facility in Saint

Peters, Missouri, where it has been engaged in the manufacture, distribution and non-retail sale of silicon wafers, that during the 12-month period ending January 1, 2004,[1] Respondent in conducting its aforesaid business operations, sold and shipped from its Saint Peters facility, goods valued in excess of $50,000 directly to points outside of the State of Missouri and at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

B. The Labor Organization

The complaint alleges, Respondent admits and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

C. The Appropriate Unit

> All full-time and regular part-time employees employed in the MTT[2] classification at the Employer's Saint Peters, Missouri facility, EXCLUDING all utility operators, office clerical and professional employees, guards, supervisors as defined in the Act, and all other employees.

The complaint further alleges, Respondent admits and I find that on June 5 and 6, 2002, a representation election was held among the employees in the Unit and on October 24, 2002, the Union was certified as the exclusive collective-bargaining representative of the Unit and that at all material times since June 6, 2002, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

The complaint alleges and Respondent admits and I find that on January 1, 2004, Respondent took the following actions regarding Unit employees' health insurance:

i. changed the carrier from United Healthcare to Aetna;
ii. changed the benefits; and
iii. changed the amount of the employee contribution for the premium.

The complaint alleges, Respondent admits and I find that on January 1, 2004, Respondent took the following actions regarding Unit employees' dental insurance:

i. changed the benefits; and
ii. changed the amount of the employee contribution for the premium.

The complaint alleges, Respondent admits and I find that on January 1, 2004, Respondent implemented an optional policy, which if selected by Unit employees through an election or by default, changed their vacation, holiday, short term disability leaves, leave of absence and leave sell back benefits.

The complaint also alleges and I find that the above subjects relate to wages, hours, and other terms and conditions of employment and are mandatory subjects of bargaining, and that

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1 All dates are in 2004 unless otherwise stated.

2 Maintenance Mechanic

Respondent engaged in the aforesaid conduct without prior notice to the Union and without affording the Union with an opportunity to bargain with respect to this conduct and the effects of this conduct.

The complaint further alleges and Respondent denies and I find based on the foregoing admissions and the record as a whole that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees.

The facts of this case as set out above are undisputed. Following the certification of the Union as the collective bargaining representative of the Unit employees on October 24, 2002, the Respondent failed and refused to recognize the Union and to give it notice of any planned changes to the Unit employees' benefits and terms and conditions of employment and spurned the Union's request for recognition and demand for bargaining. Instead Respondent chose to test the certification of the Union and lost before the Board and the Board's decision of *MEMC Electronic Materials, Inc.*, 338 NLRB No. 142 slip op. at 2 (1993) was ultimately enforced by the Eighth Circuit of the United States Court of Appeals on April 9, 2004 in *NLRB v. MEMC Electronic Materials, Inc.* in Case Nos. 03-2471 and 03-2764. In the meantime the Respondent announced changes to the health and dental insurance policies and the leave policies of the Unit employees and implemented these changes on January 1, 2004. In the case of the health insurance plans, Respondent changed its health insurance carrier from United Healthcare to Aetna. It changed from offering one plan during 2003 to three different plan options called high, middle, and base. Under the high plan Unit employees' share of the total premium increased from 20 to 30 percent and their out-of-pocket expenses for the premium increased by 74 percent, but the level of benefits remained the same. Under the base plan employees' share of the total premium remained at 20 percent, but the level of benefits decreased. Under the middle plan employees' share of the total premium increased from 20 to 25 percent, the out-of-pocket expenses for the premium increased by 30 percent and the level of benefits decreased.

It is undisputed and Respondent admits that it failed to provide the Union notice or to bargain with it regarding the changes to the unit employees' health benefits. Rather it implemented these changes unilaterally. In its defense the Respondent contends that it is in an untenable position because it has agreed to a plan with Aetna Insurance Company for all of its employees in its three locations in the United States encompassing the Unit employees as well as its other employees and that the Unit employees make up only 7 percent of its total employee complement. Respondent moves from this argument to another contention which is that there is ongoing significant change in the insurance underwriting field which it refers to as the "dynamic status quo" and that this necessitates Respondent's adjustment to meet these new challenges. Respondent thus contends that it has not implemented any material or substantial unilateral changes violative of the Act but that it has merely met the challenges of the dynamic changes in the health insurance field as they arose. What Respondent fails to point out, however, is that it created the situation it finds itself in by bypassing the Union and failing to recognize and bargain with the Union and entering into agreements with Aetna by its implementation of these unilateral changes. Respondent contends that if the employees in the Unit were not grouped together with its other employees in the total plan their costs would have been greater. It thus contends that there is no meaningful remedy. When an employer makes changes to the terms and conditions of employment of represented employees while it is challenging the collective bargaining representative's certification, it does so at its own peril. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974).

It is well settled that Respondent's change of carriers from United Healthcare was a mandatory subject of bargaining. *Seiler Tank Truck Service*, 307 NLRB 1090, 1100 (1992); *The Connecticut Light & Power Company*, 196 NLRB 967, 969 (1972). The change in the level of benefits from one health insurance plan to three plans with different and decreased benefits was a mandatory subject of bargaining. *Atheny Products Corp.*, 282 NLRB 203, 205 (1986); See also *Exxon Co. U.S.A.*, 315 NLRB 952, 955 (1994); and *Suffolk Child Development Center*, 277 NLRB 1345, 1349 (1985); *Post-Tribune Co.*, 337 NLRB 1279, 1280, 1281 (2002). The change in the percentage allocation of the total premium paid for by Respondent was a mandatory subject of bargaining *Croft Metals*, 272 NLRB 208, 213 (1985), *Post-Tribune Co.*, *supra.* The increase in the amount employees paid for health insurance was a mandatory subject of bargaining. *Flambeau Airmold Corp.*, 334 NLRB 165, 179 (2001). I find Respondent's contentions, that the changes were not mandatory because it offered employees options, to be without merit as all of the options constituted significant changes to the employees' terms and conditions of employment.

I further find that Respondent violated Section 8(a)(1) and (5) of the Act by its unilateral change in dental insurance benefits on January, 1, 2004. Respondent changed from offering one dental plan in 2003 to two different plans called high and base. Under the high plan the percentage of the total premium employees paid increased from 25 to 30 percent and the out-of-pocket expenses for the premium increased but the level of benefits remained the same. Under the base plan the percentage of premium paid by the employees and their out-of-pocket expenses remained the same but their level of benefits decreased. The foregoing changes are mandatory subjects of bargaining and Respondent unilaterally implemented them and thus violated Section 8(a)(1) and (5) of the Act. *Croft Metals*; *supra, Post-Tribune, supra*; *Flambeau Airmold Corp., supra* and *Atheny Products Corp., supra.*

Respondent also violated Section 8(a)(1) and (5) of the Act by unilaterally offering employees a new leave policy called Paid Time Off (PTO) on January 1, 2004. The PTO policy provided that employees would not be paid when they were off on a holiday unless they used leave, that employees would earn more leave per pay period, that employees can carry over leave from one calendar year to the next, that employees on short-term disability can use leave after 3 days in order to be paid at 100 percent of their pay and that employees can use leave as it is earned rather than waiting until the following January.

On January 1, 2004, Respondent unilaterally changed its accrued leave policy by providing that employees on short-term disability leave or leave of absence, cease accruing vacation benefits after they are absent for more than 30 days and employees are no longer allowed to sell back half of their remaining vacation at the end of the year. At the end of 2004, all Unit employees will be denied the opportunity to sell back half of their remaining vacation. The above changes to the leave benefits are mandatory subjects of bargaining and a change affects hours and other terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 766, 744 (1962); *Martin Marietta Energy*, 283 NLRB 173, 175-176 (1987).

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time employees employed in the MTT classification at the Employer's Saint Peters, Missouri facility, EXCLUDING all utility operators, office clerical and professional employees, guards, supervisors as defined in the Act, and all other employees.

At all times since June 6, 2002, the Union has been the exclusive collective bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

4. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing employees' health and dental insurance benefits and offering employees the option of a new leave policy.

5. The above unfair labor practices in conjunction with Respondent's status as an employer affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it shall be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent on January 1, 2004, unilaterally changed the medical and dental plans and premiums deductions and the health policy carrier and the Paid Time Off leave policy, for the employees in the bargaining unit represented by the Union, I recommend that Respondent be ordered to restore the status quo ante as existed prior to these changes, and upon demand by the Union bargain in good faith to an agreement or valid impasse regarding the changes. Respondent shall immediately refund any increase in the health and dental premiums and expenses incurred by the unit employees by reason of these changes and any loss in benefits and any loss of leave time or wages and benefits caused by the change in the leave policy. Interest shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also order that Respondent post the attached "Notice To Employees" a copy of which is attached hereto as "Appendix" for a period of 60 consecutive days.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]:

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3 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, MEMC Electric Materials, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist:

(a) Unilaterally changing employees' health and dental insurance benefits.

(b) Unilaterally offering employees the option of a new leave policy.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the policies of the Act:

(a) On request bargain with the Union.

(b) On request of the Union, rescind the changes to the health and dental insurance benefits and premiums.

(c) On request of the Union, rescind the change in the carrier providing health insurance and restore insurance offered by United Healthcare before the change.

(d) Make employees whole for all increased costs to them for health and dental insurance benefits, including the cost of the health and dental insurance premiums and the increase in the percentage of the total premiums for health and dental insurance, with interest.

(e) On request of the Union rescind the optional Paid Time Off plan offered to employees.

(f) On request of the Union, rescind the changes to the leave sell back and leave accrual while on short-term disability or leave of absence under the accrued leave policy.

(g) Make employees whole for any lost wages or leave hours resulting from the change in the accrued leave policy and the change to the PTO plan, with interest.

(h) Preserve, and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, including an electronic copy of other records if stored in electronic form, necessary to analyze the amount of backpay or costs due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Saint Peters, Missouri copies of the attached notice marked "Appendix."[4] Copies of the notice, on

4 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading

Continued

forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2003.

(j) Within 21 days after service by the Regional Director file a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C.

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Lawrence W. Cullen
Administrative Law Judge

"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read **"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT make changes to, the benefits offered under our health and dental insurance policies or to the percentage of the total premium employees pay, or the cost of the premium hourly maintenance employees at the Saint Peters facility are required to pay for such insurance, without providing the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) with adequate prior notice and an opportunity for bargaining.

WE WILL NOT change the carrier providing insurance for hourly maintenance employees at the Saint Peters facility without providing the Union with adequate prior notice and an opportunity for bargaining.

WE WILL NOT change our policies regarding vacation, holidays, short term disability leave, leave of absence, or selling back unused leave for hourly maintenance employees at the Saint Peters facility without providing the Union with adequate prior notice and an opportunity for bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL bargain collectively and in good faith with the Union as the exclusive collective bargaining representative of employees at our Saint Peters facility in the appropriate unit set forth below:

All full-time and regular part-time employees employed in the MTT classification at the Employer's Saint Peters, Missouri facility, EXCLUDING all utility operators, office clerical and professional employees, guards, supervisors as defined in the Act, and all other employees.

WE WILL rescind, if requested to do so by the Union, the January 1, 2004, unilateral changes to the benefits offered under our dental and health insurance policies for hourly maintenance employees at the Saint Peters facility and make them whole for any additional expenses incurred

by them as a result of the changes to the benefits, with interest.

WE WILL make whole our hourly maintenance employees at the Saint Peters facility for any additional costs to them for health and dental insurance premiums as a result of our January 1, 2004 changes, with interest.

WE WILL rescind, if requested to do so by the Union, the January 1, 2004, change to the carrier providing health insurance for hourly maintenance employees at the Saint Peters facility and make back contributions to United Healthcare in order to restore the insurance offered before the change.

WE WILL rescind, if requested to do so by the Union, the unilateral changes made on January 1, 2004, to our vacation, holidays, short term disability leave, leave of absence, and selling back unused leave policies for our hourly maintenance employees at the Saint Peters facility and make them whole for any lost wages or hours resulting form these changes, with interest.

MEMC ELECTRONIC MATERIALS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63101-2829,
(314) 539-7770, Hours: 8: a.m. to 4: 30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, **(314) 539-7780**